SUPREME COURT, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-694

A. HENRY TAGER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING ON ORDER DENYING WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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SUPPLEMENTAL STATEMENT

Pursuant to Rule 58(2) of the Rules of the Supreme Court, petitioner respectfully submits the within Petition for Rehearing of the Court's Order denying certiorari in these proceedings entered February 19, 1974, calling the Court's attention to intervening circumstances of substantial and controlling effect, and to substantial grounds available to petitioner not previously presented.

ADDITIONAL QUESTIONS PRESENTED BY INTERVENING MATTER

1. Whether the trial court's instruction that the jury might infer from proof of possession in one state of property stolen in another that the possessor not only knew such property to be stolen, but also transported it or caused it to be transported in interstate commerce, violates due process of law and is in conflict with the decision of this Court in *Barnes* v. *United States*, ... U.S. ....., 37 L. Ed. 2d 380, 93 S. Ct. ..... (1973).

2. Whether the admission of evidence which was inconsistent with or contradictory to statements previously made by petitioner for the purpose of proving consciousness of guilt and unlawful intent, and instructing the jury that such evidence might be so received, comports with due process where such inconsistencies do not relate to or do not reach the corpus delicti of the crimes sought to be proved.

3. Whether the decision of the United States Court of Appeals for the Tenth Circuit conflicts with the prior decisions of this Court and of the various courts of appeal with respect to its affirmance of the trial court's rulings on the admissability and use by the prosecution of prior inconsistent statements to impeach or refresh the recollection of its own witnesses; whether such affirmance in the context of this case constitutes a sanction of such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and whether petitioner was so prejudiced by said admission and use as to have been denied due process of law.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 18:

§ 371. *Conspiracy to commit offense or to defraud United States*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

United States Code, Title 18:

§ 2314. *Transportation of stolen goods, securities, moneys, fraudulent state tax stamps, or articles used in counterfeiting*

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; . . . . Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. Sept. 28, 1968, Pub. L. 90-535, 82 Stat. 885.

United States Code, Title 18:

§ 2315. *Sale or receipt of stolen goods, securities, moneys, or fraudulent state tax stamps.*

Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or . . . .

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both. Oct. 4, 1961, Pub. L. 87-371, Sec. 3, 75 Stat. 800.

ADDITIONAL REASONS FOR GRANTING THE WRIT PRESENTED BY INTERVENING MATTER

1. The trial court's instruction that the jury might infer from proof of possession in one state of property stolen in another that the possessor not only knew such property to be stolen but also transported it or caused it to be transported in interstate commerce, violates due process of law and is in conflict with the decision of this Court in Barnes v. United States, ... U.S. ....., 37 L. Ed. 2d 380, 93 S. Ct. ..... (1973).

Petitioner was convicted on each of three counts of an indictment. Count I charged that petitioner and co-defendant Konys conspired with each other and with unindicted co-conspirators David L. Casady and Boyd Rasmussen to knowingly receive, transport and cause to be transported in interstate commerce a stolen United States

Treasury Bill with a face value of $100,000, in violation of 18 U.S.C. § 371; Count II charged that they caused the treasury bill to be transported from Las Vegas, Nevada to Kansas City, Kansas, in violation of 18 U.S.C. § 2314; and Count III charged that petitioner received the treasury bill, which was moving in interstate commerce, in violation of 18 U.S.C. § 2315.

A necessary and essential element of each of the charges was *knowledge* on the part of petitioner of the stolen character of the treasury bill. However, petitioner need not only have known that the bill was stolen in order to sustain the convictions. He must *also* have conspired to transport or cause it to be transported in interstate commerce;[1] he must *also* have actually caused it to be so transported;[2] and he must *also* have received it while moving as or while part of interstate commerce.[3]

In its instructions to the jury, the trial court charged that:

> ". . . *possession in one state of property recently stolen in another state,* if not satisfactorily explained *is ordinarily a circumstance from which the jury may reasonably draw the inference* and find in light of surrounding circumstances shown by the evidence in the case, *that the person in possession not only knew it to be stolen, but also transported it or caused it to be transported in interstate commerce.*" (emphasis supplied)[4]

This Court has recently had an opportunity to consider a trial court instruction that a jury ordinarily would be

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1. 18 U.S.C. § 371.
2. 18 U.S.C. § 2314.
3. 18 U.S.C. § 2315.
4. The full instruction appears at Appendix A hereto.

justified in inferring from unexplained possession of recently stolen property that the defendant possessed it with knowledge that it was stolen, in *Barnes* v. *United States*, ... U.S. ....., 37 L. Ed. 2d 380, 93 S. Ct. ..... (1973). The *Barnes* court held that such an instruction satisfied the dictates of due process in that the common law inference encompassed thereby met the reasonable doubt standard which the Court held to be applicable in criminal cases, i.e., that the evidence necessary to invoke the inference be sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. However, the Court cautioned in its opinion against undue extension of its doctrine in *Barnes*, stating: "We do not decide today whether a judge formulated inference of lesser age or less widely accepted may properly be emphasized by means of a jury instruction." Id., at Note 9.

In *Barnes*, the Court reviewed four recent decisions in which it had considered the validity under the Due Process Clause of criminal presumptions and inferences, i.e., *Turner* v. *United States*, 396, U.S. 398, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970); *Leary* v. *United States*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969); *United States* v. *Romano*, 382 U.S. 136, 15 L. Ed. 2d 210, 86 S. Ct. 279 (1965); and *United States* v. *Gainey*, 380 U.S. 63, 13 L. Ed. 2d 658, 85 S. Ct. 754 (1965).

In *Gainey*, supra, the Court sustained the constitutionality of an instruction authorizing the jury to infer from a defendant's unexplained presence at an illegal still that he was carrying on "the business of a distiller or rectifier without having given bond as required by law", upholding the inference on the basis of the comprehensive nature of the "carrying on" offense and the common knowledge that illegal stills are secluded secret operations. In *Romano*, supra, however, the Court determined that mere

presence at an illegal still could not support the inference that the defendant was in possession, custody or control of the still, a narrower offense, holding that mere presence held too tenuous a connection with possession to permit a reasonable inference of guilt. In *Leary*, supra, the Court considered a challenge to a statutory inference that possession of marihuana, unless satisfactorily explained, was sufficient to prove that the marihuana had been illegally imported; and in view of the significant possibility that any given marihuana was domestically grown and the improbability that a marihuana user would know whether his marihuana was of domestic or imported origin, concluded that the inference did not satisfy due process, stating that an inference is " 'irrational' or 'arbitrary', and hence unconstitutional, unless it can be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S., at 6, 23 L. Ed. 2d, at 57. In *Turner*, supra, the Court considered the constitutionality of instructing the jury that it may infer from possession of heroin and cocaine that the defendant knew these drugs had been illegally imported, upholding the inference with regard to heroin and striking it down with regard to cocaine. The Court found it unnecessary to resolve whether the more likely than not standard referred to in *Leary*, supra, or a reasonable doubt standard controlled in criminal cases, as the inference was valid by either standard with regard to heroin, and by neither with regard to cocaine. Finally, in *Barnes*, the Court established that the reasonable doubt standard is the controlling factor in criminal cases, and that a criminal inference satisfies due process only where the evidence necessary to invoke the inference is sufficient to permit a rational juror to find the inferred fact therefrom beyond a reasonable doubt.

Petitioner respectfully contends that the foredescribed instruction tendered in the present case meets neither the reasonable doubt standard proscribed by *Barnes*, the more likely than not standard laid down by *Leary*, or even the rational connection test espoused by the earlier cases. The inference contended for here can be founded on nothing stronger than conjecture. To infer from possession of recently stolen property that the possessor knew that it was stolen is one thing. But to infer from that possession that he likewise transported it or caused it to be transported in interstate commerce, or even received it in interstate commerce, is quite another. As Mr. Justice Douglas noted in his dissent in *Barnes*, supra:

> "We held in *Tot* v. *United States*, 319 U.S. 463, 87 L.Ed. 1519, 63 S.Ct. 1241, that where a federal Act made it unlawful for any convicted person to possess a firearm that had been shipped in interstate or foreign commerce, it was unconstitutional to presume that a firearm possessed by such person had been received in interstate or foreign commerce. The decision was unanimous." 37 L. Ed. 2d, at 390.

The circumstances of the case at bar are not dissimilar to *Tot*. Expressed in terms of the reasonable doubt test laid down in *Barnes*, to sustain the validity of the inference opted for in the present case, it would be necessary to say that mere proof of possession in one state of property recently stolen in another is sufficient to permit a rational juror to conclude beyond a reasonable doubt not only that the possessor knew the property to be stolen, but that he likewise had transported it or caused it to be transported in interstate commerce. Such a conclusion is of course patently absurd, the inferred fact bearing no more relationship to the proven than the marihuana

presumption condemned by *Leary*, supra or the cocaine presumption struck down by *Turner*, supra. In the instant case it would permit of proof by inference of not one but *two* of the essential elements of the crimes sought to be proved, i.e., both knowledge *and* transport or receipt. Petitioner respectfully contends that such an extension of the doctrine laid down by *Barnes*, by allowing the grounding of one inference upon another so as to permit the ultimate inference of facts entirely unrelated to those proven, is in direct violation of his right to due process of law.

One additional point need be made with respect to the inference flowing from the wrongful instruction in this case. To allow such an inference would not only permit proof by inference of two essential elements of the crimes sought to be proved; it would likewise permit the very *creation* of crime by inference. It is only through their connection with interstate commerce that the offenses here charged become federal crimes. If juries are allowed to simply supply that connection by inference drawn from mere possession of property stolen in another state, the federal courts will be laid open for trials in connection with virtually every burglary, larceny and theft which occurs in the land. In the present context of overcrowded courts and dockets and constant striving for measures of judicial economy in order to promote justice, such an enormous extension of federal jurisdiction "by inference" would seem ludicrous.

2. The admission of evidence which was inconsistent with or contradictory to statements previously made by petitioner for the purpose of proving consciousness of guilt and unlawful intent, and instructing the jury that such evidence might be so received, does not comport with due process where such inconsistencies do not reach the corpus delicti of the crimes sought to be proved.

In its charge to the jury in the present case, the trial court said:

> "When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence, and this explanation or statement is later found by you beyond a reasonable doubt to be false, the jury may consider whether the circumstantial evidence points to a consciousness of guilt."[5]

United States v. *Lacey*, 459 F. 2d 86 (C.A. 3d 1972) illustrates the proper and permissible use of prior exculpatory statements from an evidentiary standpoint, where the facts that they tend to prove go directly to the corpus delicti of the crime. However, as related in *United States* v. *McConney*, 329 F. 2d 467 (C.A. 2d 1964) (which case is almost directly in point in this case), where the facts which the prior statements tend to prove are clearly not sufficient in and of themselves to establish the necessary and essential element of the crime sought to be proved, *i.e.*, *knowledge*, they do not constitute a sufficient basis, even if established as false, to permit an inference of guilt adequate to sustain a conviction.

Exculpatory statements, as defined in *Lacey*, supra, are explanations tending to explain or excuse an act, which

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5. The full instruction appears at Appendix B hereto.

when shown to be false, may be circumstantial evidence of guilty consciousness, and the jury may consider them as such. However, as related in *McConney,* supra, to sustain a conviction, the statements must relate directly to the corpus delicti of the crime.

The Tenth Circuit makes reference to the prior exculpatory statements admitted as evidence of guilty consciousness and unlawful intent on the part of petitioner in the case at bar at Page 10 of its Opinion:

> "The alleged erroneously admitted evidence consisted of the hotel records indicating he had not been registered at the hotel; the evidence showing a lack of necessity of taking the treasury bill to Kansas City to obtain funds on it; the inconsistent and contradictory statements made by Tager regarding the amount of his fee in the transaction; and testimony that Tager had not made repeated declarations of his intent to have the bill authenticated by federal authorities."

The hotel records, admitted through testimony by a Mr. Vernon R. George, Assistant Manager of the Flamingo Hotel in Las Vegas, Nevada (Tr. 439) over objection of defense counsel, purportedly showed an inconsistency between registration information given by petitioner at an F.B.I. interview some eighteen months prior to his indictment and the hotel records for the weekend in question. At the time of the F.B.I. interview, petitioner purportedly advised that he had registered at the Flamingo Hotel on his arrival in Las Vegas at some time prior to the alleged conspiracy. It is undisputed from the record that petitioner had never heard of the treasury bill forming the subject matter of the alleged crimes nor of the other principals in the alleged conspiracy until some time after his arrival in Las Vegas. Accordingly, his registration clearly predated the alleged conspiracy and the substantive crimes

with which he was charged. Any attempt to secrete his whereabouts by a false registration or registration under an assumed name at the Flamingo or any other hotel would of necessity have been entirely unrelated to those crimes; and any information relating thereto would neither reach the corpus delicti of the crime nor even the test of relevancy supplied by the Federal Rules.[6] The evidence as to the lack of necessity of taking the treasury bill to Kansas City was supplied largely by Mr. Richard Sosnika, a Las Vegas banker who testified solely as to what commercial banking practices actually *are* in Las Vegas, Nevada, but who provided no hint of an answer to the only material question relating to those practices, i.e., what the parties involved *actually knew, believed them to be or were informed as at February 7, 1970.* Evidence regarding supposed contradictory statements by petitioner with respect to the amount of his fee as stated immediately following the termination of the alleged conspiracy and at his appearance before a federal grand jury many months subsequent thereto was admitted largely through testimony by F.B.I. agent Airey (Tr. 587), and otherwise from banker Dirksen, the impropriety of which will be treated later in this petition. The record demonstrates that agent Airey's recollection was refreshed for such testimony from secondary evidence (Tr. 433/34) in the form of transcribed notes regarding what the petitioner had stated his fee was to be at the time of an F.B.I. interview immediately following termination of the alleged conspiracy, which memoranda had not been furnished for review and refreshment of recollection by petitioner at the time of his grand jury testimony (Tr. 591), as was common practice, and as to which petitioner had only suggested at the time of the grand jury testimony that the agent might have made an error in the transcription of his earlier notes. As is clear from the record, petitioner never

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6. Rule 401, Federal Rules of Evidence.

denied that he was to receive a fee; neither did he specifically deny the amount of the fee as suggested by the agent's memory. He only questioned, during his grand jury testimony given many months after the initial interview, without benefit of the customary review afforded witnesses by the Bureau's own admission (Tr. 591), the accuracy of the agent's secondhand notes and whether his fee would have comported with that notation. As clear a case could have been made for his having acquiesced in the agent's recollection of the amount of the fee as for his having refuted it. Without such disclaimer, no prior inconsistency actually existed, but even if it had, it would not have met the *McConney* test of reaching the corpus delicti of the crime, as *any* fee for an illegal act would be wrongful. With respect to the question of petitioner's expressed intention to have the treasury bill in question checked out, the Circuit stated (Op. 5) that there was "some evidence" showing that petitioner suggested to the bank's officers that federal authorities be contacted for the purpose of establishing the genuineness of the bill, and (Op. 7) that both Rasmussen and Casady testified that petitioner had made no statements that he was going to contact federal authorities to verify the authenticity of the bill. In fact, both Rasmussen (Tr. 112; 152/53) and Casady (Tr. 190; 268/69) testified repeatedly, unequivocably and without contradiction that petitioner had insisted that the bill be checked out thoroughly through his banking institution, and by reason of the fact that the subject security was a United States Treasury obligation, this investigation must, by implication, have been required to be carried out by contact with federal authorities. Uncontroverted testimony by both bank officials (Tr. 574/75; 557/62) and F.B.I. agents (Tr. 588/93; 597/98) confirms petitioner's insistance upon such investigation. Contrary to the Court's suggestion that there was "some evidence" of petitioner's

"suggestion", there was repeated and uncontroverted evidence of his "insistance". There was no evidence to the contrary. There may have been a discrepancy as to which federal agency was to be checked, but this question clearly does not reach the corpus delicti.

Petitioner respectfully contends that each interjection of purported prior exculpatory statements into the present case by the prosecution was nothing more than an attempt to slander and prejudice him in the eyes of the jury, to confound him in his defense, and to inject by inference and innuendo the essential element of knowledge which it was otherwise unable to prove. Even if such prior statements were shown to be false (which in each case they were not), to allow an inference of guilty consciousness with respect to a crime to flow from proof of statements or actions entirely unrelated to that crime, or which do not reach the corpus delicti thereof, does not comport with due process of law. It is simply another application of the type of inference of guilt without proper association which was condemned by *Romano, Leary, Turner* and *Tot,* supra.

3. The decision of the United States Court of Appeals for the Tenth Circuit conflicts with the prior decisions of this Court and of the various courts of appeal with respect to its affirmance of the trial court's rulings on the admissability and use by the prosecution of prior inconsistent statements to impeach or refresh the recollection of its own witnesses; such affirmance in the context of this case constitutes a sanction of such a departure by the trial court from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision; and petitioner was so prejudiced by said admission and use as to have been denied due process of law.

As to the use of prior inconsistent statements by the government in this case, the Circuit simply states (Op. 10):

> "The use of such testimony for this purpose rests in the sound discretion of the trial judge. We find no abuse of that discretion in the trial here."

Petitioner would contend however, that each use by the government of prior inconsistent statements in the subject case violates a number of proscriptions established by clear precedent garnered from decisions of this Court and those of the various Courts of Appeal. Since no limiting instruction was given with respect to any of them, *all* violate the fundamental requirement that it is the duty of the court to instruct the jury as to the limited purpose for which such evidence may be considered.[7] On this basis alone, under the cases cited, each such use involved prejudicial error. Most, if not all similarly violate the equally

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7. *Sprinkle* v. *Davis*, 111 F. 2d 925 (C.A. 4th 1940); *United State* v. *Barnes*, 319 F. 2d 290 (C.A. 6th 1963); *Valentine* v. *United States*, 272 F. 2d 777 (C.A. 5th 1959); *Cannady* v. *United States*, 351 F. 2d 796 (C.A. D.C. 1965).

well established principle that the fact that the testimony itself serves an impeaching function does not justify its use where the content of the statement is highly prejudicial.[8] Conversely, few, if any met the established requirement that for impeachment to be valid, it must relate to a "core" issue[9]; and none probably met the most fundamental of all requirements, i.e., that impeachment of one's own witness must be established on the predicate of both "surprise" and "damage"[10], as there was doubtless little "surprise" involved, the prosecutor quite obviously having all prior statements marked and ready to pose on a moment's notice. An examination of the record discloses that prior inconsistent statements were introduced by the government with respect to five separate witnesses, i.e., Gilbert Barnes (Tr. 472/78), David Casady (Tr. 186, 207), Ralph Dirksen (Tr. 570), Jay L. Fihn (Tr. 503/09) and Boyd Rasmussen (Tr. 106/08). Petitioner respectfully submits that prejudicial error was present in each instance, as a closer examination of each such individual use discloses.

Gilbert Barnes, was read a series of questions and answers by the prosecutor beginning at Tr. 423 touching upon whether he, the petitioner, Mr. Fihn, Mr. Rasmussen, or any of them, knew on the afternoon of February 7, 1970 of the degree of difficulty or ease with which a

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8. *Cannady* v. *United States,* supra, n. 7; *Bartley* v. *United States,* 319 F. 2d 717 (C.A. D.C. 1963); *Baber* v. *United States,* 324 F. 2d 390 (C.A. D.C. 1963), *cert. denied,* 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86 (1964).

9. *3 Wigmore on Evidence,* §§ 1020-23 (Chadbourn rev. 1970); *McCormick on Evidence,* § 36 (1954); *United States* v. *Munchak,* 443 F. 2d 531, 534 (C.A. 2d 1971); *United States* v. *Barash,* 365 F. 2d 395, 401 (C.A. 2d 1966); *United States* v. *Del Pergatorio,* 411 F. 2d 84 (C.A. 2d 1969); *United States* v. *Light,* 394 F. 2d 908 (C.A. 2d 1968).

10. *Goings* v. *United States,* 377 F. 2d 753 (C.A. 8th 1967); *3 Wigmore on Evidence,* §§ 904, 1043 (3d Ed.).

loan could be obtained in Las Vegas, Nevada, secured by a U.S. Treasury Bill, and whether any discussions had been had among them concerning this subject. Mr. Barnes had testified on direct that there had been some discussion of this matter on the day in question and that the general feeling was that it would have been quite difficult to obtain the loan. The government sought to impeach Mr. Barnes by reading him statements and answers from his grand jury testimony of April 21, 1971, which indicated that he had not known how difficult it might have been to place a loan in Las Vegas as at February 7, 1970, and that there had not been discussions concerning this matter. Mr. Barnes repudiated his prior grand jury testimony (Tr. 477), stating that he had not remembered the February 7 conversation at the time of his earlier grand jury testimony, but that his memory had since been refreshed. This is probably the least offensive of the five separate cases in which the prosecution was allowed to improperly place prior inconsistent statements before the jury. It still however lacked one absolutely essential element, i.e., the limiting instruction of the trial court.[11] Without that instruction, as the case was given to the jury, Barnes' out of court statements could be given the same weight as sworn testimony by him at trial, a clear violation of established precedent.[12]

David Casady, after previously testifying (Tr. 186) that defendant Konys had asked him if he could handle

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11. *Sprinkle* v. *Davis, United States* v. *Barnes, Valentine* v. *United States* and *Cannady* v. *United States,* all supra, n. 7.

12. *United States* v. *Dobbs,* 448 F. 2d 1262 (C.A. 5th 1971); *Young* v. *United States,* 97 F. 2d 200 (C.A. 5th 1938); *Slade* v. *United States,* 267 F. 2d 834 (C.A. 5th 1959); *United States* v. *Hicks,* 420 F. 2d 814 (C.A. 5th 1970); *United States* v. *Johnson,* 427 F. 2d 957 (C.A. 5th 1970); *United States* v. *Barnes,* supra, n. 7; *Brooks* v. *United States,* 309 F. 2d 580 (C.A. 10th 1962); *Bridges* v. *Wixon,* 326 U.S. 135, 65 S. Ct. 3443, 89 L. Ed. 2103; *3 Wigmore on Evidence,* § 1018 (3d Ed.).

the treasury bill forming the subject matter of the charges in this case and that Konys had stated that he wanted twenty-five thousand dollars from it, was asked the further question "Was there any discussion of what you would gain by helping him?," to which he responded "Yes, I was to get anything over that that I could get." Casady was then asked, "Did you make any comment to him about what you would hope to gain from it?", and responded, "No. I said, I'll have to find out and see if I can handle the bill or not." Whereupon, at Tr. 186/87, he was confronted with the following prior inconsistent statement, without benefit of any foundation being laid by the prosecution, viz., "Do you recall stating in a prior grand jury appearance that you told Mr. Konys you would try to get thirty thousand dollars for the bill?," to which he responded, "That's right." This testimony is susceptible of double interpretation, either one of which fails. If claimed to be an impeachment by reason of a "surprise" answer, it both fails for lack of foundation and quite obviously runs afoul of the fundamental principle that impeachment of one's own witness is permitted only to remove the adverse effect of any surprise testimony and cannot be used to supply anticipated testimony.[13] Lack of limiting instruction likewise violates precedents previously cited.[14] If offered for refreshment of memory, it offends the equally fundamental principle that when a witness merely fails, when called, to testify in favor of the party calling him, as he was expected to do, but says nothing which tends to aid the case of the adversary party, he

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13. *United States* v. *Dobbs*, *Young* v. *United States*, *Slade* v. *United States*, *United States* v. *Hicks*, *United States* v. *Johnson*, *United States* v. *Barnes*, *Brooks* v. *United States*, and *Bridges* v. *Wixon*, all supra, n. 12; and *3 Wigmore on Evidence*, § 1018.

14. Note 11, supra.

cannot be impeached by the party who calls him.[15] Additionally, as to petitioner, the testimony seriously violates clearly established precedent earlier cited. It is highly prejudicial as to him[16] in that it involves a pre-conspiracy conversation before he was ever even contacted and for that reason is likewise wholly collateral and immaterial as to him.[17] The amount which Casady hoped to profit, his consciousness of guilt or his knowledge that the bill was stolen prior to the alleged conspiracy, are irrelevant as a matter of law as to petitioner's guilt or knowledge.

The prosecution again asserted a prior inconsistent statement with respect to Casady's testimony at Tr. 207. After having been asked on direct (Tr. 206) whether he could recall the exact words used by petitioner in telling him that something was wrong when the F.B.I. were on their way to investigate the bill at the Kansas City bank, and having responded "No, he said, 'There is something wrong with the bill and the Secret Service is coming out to talk to us about it' ", he was confronted by the prosecutor without foundation, with the following question, viz., "Do you recall making a statement to Mr. Owsley of the F.B.I., that Mr. Tager said to you at the time, 'We got problems'?" Casady then responded, "I said—I remember him saying, 'We got problems, the Secret Service is coming out to talk to us about that bill,' I said, 'I don't want to talk to them.' " Again, the object of the prosecution, as in the foregoing examples, was obviously to interject hearsay testimony into the record

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15. *Goings* v. *United States*, supra, n. 10; *United States* v. *Booz*, 451 F. 2d 719 (C.A. 3d 1971); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1939), *reh. denied*, 310 U.S. 658, 60 S. Ct. 1091, 84 L. Ed. 1421 (1939); *Rosenthal* v. *United States*, 248 F. 684 (C.A. 8th 1918).

16. Note 8, supra.

17. Note 9, supra.

without proper foundation. It is again subject to the criticism that it runs afoul of the proscription that prior statements of a witness are admissable only to discredit a witness and not competent as substantive evidence of the facts to which the prior statement relates, if termed a response to a surprise[18]; and if one attempts to justify it on the basis of refreshment of memory it violates a further number of established prohibitions, viz., prior inconsistent statements may not be admitted into evidence or their contents even seen by the jury[19], previously given statements cannot be offered to substitute for a witness' testimony under the guise of refreshing recollection"[20], proper exhaustive foundation was not laid[21], and the refreshment procedure cannot be used to fill in a witness' memory gaps by the insertion of hearsay statements suggested to him in the place of his own sworn testimony[22]. Additionally, the limiting instruction is once again missing, so as to do violence to authorities cited above[23]. And here too, the injected hearsay is so inflammatory and prejudicial as to violate proscriptions noted supra[24].

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18. *Goings* v. *United States*, supra, n. 10; *3 Wigmore on Evidence*, §§ 904, 1018, 1043 (3d Ed.); *United States* v. *Dobbs*, supra n. 12; *Culwell* v. *United States*, 194 F. 2d 808 (C.A. 5th 1952); *Young* v. *United States*, *Slade* v. *United States*, *United States* v. *Hicks*, *United States* v. *Johnson*, *Brooks* v. *United States*, and *Bridges* v. *Wixon*, all supra, n. 12; *United States* v. *Barnes*, supra, n. 7.

19. *United States* v. *Booz*, supra, n. 15; *3 Wigmore on Evidence*, § 763 (Chadbourn rev. 1970).

20. *Goings* v. *United States*, supra, n. 10.

21. *Goings* v. *United States*, supra, n. 10; *United States* v. *Socony-Vacuum Oil Co.*, supra, n. 15.

22. *Goings* v. *United States*, supra, n. 10; *Rosenthal* v. *United States*, supra, n. 15.

23. Note 11, supra.

24. Note 8, supra.

Ralph Dirksen. After having been asked (Tr. 569), "Did you inquire of him what his interest in the bill was?", and having received the response, "I think there was some conversation regarding that but I don't recall what the conversation was", and again (Tr. 570), "Did Mr. Tager ever tell you what he hoped to derive out of completing the transaction on this treasury bill?", with the answer, "I can't recall", the prosecutor once more, without proper foundation[25], seized upon an opportunity to inject prejudicial hearsay evidence into the record by reading the following questions and answers from Mr. Dirksen's prior grand jury testimony, viz., Question: "I realize we are asking about events that were approximately a year ago, but give us your best recollection of the amount Mr. Tager said he expected to gain by getting this bill cashed." Answer: "Well, I think it was five or ten; I believe it was ten thousand dollars that he would get as a commission for helping him get the bill cashed." And then, Question: "Do you recall that question and answer?" Answer: "Yes." Question: "Does that in any way help to refresh your memory now?" Answer: "I assume that must have been the conversation if I remembered it at that point. This has been quite a while since then." Question: "The question is after hearing that question and answer, can you now tell us what Mr. Tager told you as to the amount he expected to derive from the transaction?" Answer: "I believe he said ten thousand." The improperly admitted hearsay at this point is prejudicial in the highest possible degree. It is blatant hearsay, injected with no proper foundation or even a pretense at one. As a device for refreshing memory, it is a flagrant violation of authorities noted above[26]. In

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25. Note 21, supra.

26. *Goings* v. *United States*, supra, n. 10; *United States* v. *Socony-Vacuum Oil Co.*, supra, n. 15.

addition, as Mr. Dirksen had given no testimony in favor of the prosecution at this point, and likewise said nothing that would in any way tend to aid the petitioner, it does grave injustice to the basic general theory of admitting a prior inconsistent statement, i.e., the cancellation of an adverse answer by which a party is surprised. Where a witness gives no testimony injurious to the party calling him because of lack of memory, there is no basis for impeachment under the rule.[27] Even if the witness adopts the prior statement as true, the error is not cured. It is still a hearsay statement suggested to the witness rather than his own statement given under oath[28]. Again, the limiting instruction is absent[29] And once more, clear violation of precedent heretofore cited are present[30] by reason of the prejudicial character of the testimony.

Jay L. Fihn. Over objection by defense counsel to the propriety of his impeaching his own witness (Tr. 503), a series of questions and answers from prior grand jury proceedings were likewise read to Mr. Fihn by the prosecution. Fihn had earlier testified (Tr. 500 through 503) that there had been two reasons discussed as to why a loan on the treasury bill in question should be handled by some out of town party, one being the difficulty of obtaining loans in Las Vegas, and the other being a desire by Konys to secrete assets from his wife. Beginning at

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27. *Goings* v. *United States,* supra, n. 10; *United States* v. *Booz,* supra, n. 15; *Kuhn* v. *United States,* 24 F. 2d 910 (C.A. 9th 1928), modified on other grounds, 26 F. 2d 463, *cert. denied, Lee* v. *United States,* 278 U.S. 605, 49 S. Ct. 11, 73 L. Ed. 533 (1928); *Bushaw* v. *United States,* 353 F. 2d 477 (C.A. 9th 1965), *cert. denied,* 384 U.S. 921, 86 S. Ct. 1371, 16 L. Ed. 2d 441 (1966); *United States* v. *Duff,* 332 F. 2d 702 (C.A. 6th 1964).

28. *Goings* v. *United States,* supra, n. 10; *Rosenthal* v. *United States,* supra, n. 15.

29. Note 11, supra.

30. Note 8, supra.

Tr. 503, Prosecutor Cornwell began reading back the prior grand jury testimony. He first attempted by argument with the witness to convert petitioner's inquiry as to why a loan couldn't be made in Las Vegas to an affirmative statement by Fihn that it could be done. Then follows a series of questions and answers posed before the grand jury indicating that Fihn in fact knew that a loan could have been obtained in Las Vegas. In each instance, Fihn explained that, yes, he had known at the time of the grand jury appearance, a year after the occurrence, that a loan could have been obtained because by that time he had had an opportunity to look into the question and value of treasury bills. But, he explained further, he had not had such information available at the time of the actual occurrence, and did not know at that time that a loan could have been obtained. He insisted that his grand jury answers related purely to his knowledge at the time of his appearance before that body, and not to the time of the actual transaction. The blatant hearsay allowed to enter the record through this testimony, which continued page after biased page, left an indelible mark of prejudice upon the record. In the absence of the limiting instruction clearly required by the dictates of authorities heretofore cited[31], the jury was left with the impression that it could give equal weight to the prior inconsistent statement as that given to the direct testimony of the witness. Under precedent previously cited[32], the absence of such an instruction is clearly prejudicial error; it is in clear violation of established criterion for the impeachement of one's own witness only in cases of surprise[33];

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31. Note 11, supra.

32. *United States* v. *Barnes*, supra, n. 7

33. Note 12, supra; *Culwell* v. *United States*, supra, n. 18.

and, the testimony itself, because of its great prejudice, is a flagrant violation of established precedent.[34]

Boyd Rasmussen, in prior direct testimony (Tr. 101, 104) indicated that in a telephone conference with Casady on the evening before the first telephone contact with petitioner, Rasmussen had said to Casady, "It must be hot if you don't want to take it to the bank," and Casady had replied, "Well, I don't know that. It could be, I guess", and when asked how he interpreted such response, he stated that he couldn't conclude from the response whether it was stolen or not. Whereupon, over objection by defense counsel, the prosecution proceeded to read prior statements (Tr. 106) from a grand jury appearance wherein Rasmussen had indicated that he had in fact interpreted the response as indicating the bill was "hot". Absent limiting instruction, the jury could give equal weight to the trial testimony and the out-of-court statement, clearly error once more[35]. And again, improper impeachment not founded on surprise[36], clear irrelevance and immateriality to petitioner of this testimony regarding a preconspiracy contact between two other individuals[37], and violative prejudicial testimony[38].

It is obvious from the foregoing that clear and blatant error appears throughout the record in each instance where the prosecution made use of prior inconsistent statements to impeach or to attempt to refresh the recollection of its own witnesses. In the context of the present case, petitioner respectfully contends that such error constitutes

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34. Note 8, supra.
35. Note 12, supra.
36. Note 10, supra.
37. Note 9, supra.
38. Note 8, supra.

such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as petitioner was so prejudiced thereby as to have been effectively deprived of due process of law.

CONCLUSION

Petitioner respectfully submits that for the additional reasons stated herein, a writ of certiorari should issue to review the judgement and opinion of the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE

The undersigned, Counsel for Petitioner herein, hereby certifies that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay. Counsel further certifies that the Petition is restricted to intervening circumstances of substantial or controlling effect and to substantial grounds available to Petitioner but not previously presented.

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APPENDIX

APPENDIX A

TRIAL COURT INSTRUCTION REGARDING INFERENCES WHICH MAY BE DRAWN FROM POSSESSION OF STOLEN PROPERTY (Tr. 747)

Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

And possession in one state of property recently stolen in another state, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it or caused it to be transported in interstate commerce.

Ordinarily, the same inferences may reasonably be drawn from a false explanation of possession of recently stolen property.

The term "possession" means actual control, dominion or authority.

The term "recently" is a relative term and has no fixed meaning. Whether property may be considered as recently stolen depends upon the nature of the property and all the facts and circumstances shown by the evidence in the case. The longer the period of time since the theft,

the more doubtful becomes the inference which may reasonably be drawn from unexplained possession.

If you should find beyond a reasonable doubt from the evidence in the case that the United States Treasury Bill described in the indictment was stolen and was transported or caused to be transported in interstate commerce by a specific defendant as charged, and that, while recently stolen, the property was in the possession of the defendant in another state from that in which it was stolen, you may from those facts draw the inference that the United States Treasury Bill was transported or caused to be transported in interstate commerce by said defendant with knowledge that it was stolen, unless possession of the recently stolen property by said defendant is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case.

In considering whether possession of recently stolen property has been satisfactorily explained, the jury is reminded that in the exercise of constitutional rights, a defendant need not take the witness stand and testify.

There may be opportunities to explain possession by showing other facts and circumstances independent of the testimony of a defendant.

You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

It is the exclusive province of the jury to determine whether the facts and circumstances shown by the evidence in the case warrant any inference which the law permits you to draw from possession of recently stolen property. If any possession a defendant may have had of recently stolen property is consistent with innocence or if you entertain a reasonable doubt of guilt, you must acquit him.

APPENDIX B

TRIAL COURT INSTRUCTION REGARDING INFERENCES WHICH MAY BE DRAWN FROM PRIOR EXCULPATORY STATEMENTS (Tr. 752)

Conduct of a defendant, including statements knowingly made and acts knowingly done upon being informed that a crime has been committed or upon being confronted with a criminal charge, may be considered by the jury in the light of all other evidence in the case in determining guilt or innocence.

When a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show his innocence and this explanation or statement is later found by you beyond a reasonable doubt to be false, the jury may consider whether the circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence.

Whether or not evidence as to a defendant's voluntary explanation or a statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury.

A statement or an act is knowingly made or done if made or done voluntarily and intentionally and not because of mistake or accident or other innocent reason.

The jury will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

The very nature of an admission claimed to have been made by a defendant outside of court requires that the circumstances surrounding it be subjected to careful scrutiny always, in order to determine surely whether it was voluntarily and intentionally made.

If the evidence in the case does not convince beyond a reasonable doubt that an admission was made voluntarily and intentionally, the jury should disregard it entirely. On the other hand, if the evidence in the case does show beyond a reasonable doubt that an admission was in fact voluntarily and intentionally made by a defendant, the jury should consider it as evidence against the defendant who voluntarily and intentionally made the admission.